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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 73-246

In the Matter of
FAIRFIELD PRODUCTS, INC., a Corporation, Bankrupt,
Respondent,

vs.

JOHN MAKENS and RAY MAKENS and MARY MAKENS, Administrators of Estate of James Makens, Deceased, Appellants and Aggrieved Parties,
Petitioners and Appellants.

REPLY BY APPELLANTS AND PETITIONERS FOR WRIT OF CERTIORARI TO OPPOSITION BRIEF FILED BY APPELLEES

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Appellants and Petitioners for Writ of Certiorari file herewith its reply to appellees brief in opposition to petition for Writ of Certiorari, and bring to this Honorable Court's attention, the following:

1. Section 19 (II U. S. C. A. No. 42) JURY TRIALS.

"(a) A person against whom an involuntary petition in bankruptcy has been filed shall be entitled to have a trial

by jury in respect to the question of his insolvency, except as herein otherwise provided, and of any act of bankruptcy alleged in such petition to have been committed, upon filing a written application wherefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived".

Said section 19 A of BANKRUPTCY ACT is cited *haec verba* by these appellants and petitioners. The record shows that JOHN M. GILTINON, as attorney for dissident and minority stockholders (holding 44% of stock in FAIRFIELD PRODUCTS, INC.) filed such an answer and jury demand on May 15, 1973 **prior to order of adjudication entered May 17, 1973 by HON. FRED E. NICHOL.** In addition these appellants reiterate that said order of adjudication was entered on May 17, 1973 by U. S. District Judge Fred E. Nichol at Sioux Falls, South Dakota **ex parte and without notice of any kind being given to these appellants and petitioners.** Said grounds for vacation of adjudication were urged by these petitioners and appellants in motion to vacate adjudication petition argued on May 22, 1973 and May 23, 1973; urged again in oral argument at St. Paul, Minn. on June 11, 1973 and again in petition for rehearing in U. S. Circuit Court of Appeals, 8th Circuit, Case No. 73-1349 and not considered or ruled upon by this Court of Appeals.

2. The Court of Appeals, 8th Circuit, has so far departed from usual and accepted course of judicial proceeding in failing to abide by the ruling of the Fifth Circuit Court of Appeals decision, namely **Porterfield v. Gerstel,** 222 Federal (2) 137, that a Writ of Certiorari should be granted by U. S. Supreme Court to reconcile this situation and to call for the exercise of this court's power of supervision.

3. The brief in opposition to granting a Writ of Certiorari in this case, filed by Joe W. Cadwell, attorney for appellees, is

replete with misstatements by him. The record shows that he was counsel for the petitioning creditors, and still is, never having withdrawn his appearance for them. He is also counsel for the bankrupt corporation, by his own admission, having actively prepared the statement of affairs and bankruptcy schedules. He is still acting ostensibly for petitioning creditors and bankrupt corporation, FAIRFIELD PRODUCTS, INC., evidenced by filing his reply in opposition to petition for Writ of Certiorari, under date of August 24, 1973. The conflict of interest on Joe W. Cadwell's part acting as a dual attorney for conflicting interests was brought to the attention of U. S. Court of Appeals, 8th Circuit, in oral argument, again on Petition for Rehearing filed by these appellants and petitioners and never answered or ruled upon by this Court of Appeals, and should be ruled upon by U. S. Supreme Court in granting appellants' and petitioners' petition for Writ of Certiorari.

CONCLUSION

For these many reasons assigned, the Court is urged to grant a Writ of Certiorari.

Respectfully submitted

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Signature of Counsel

Member of U. S. Supreme Court
of United States of America Bar.
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